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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 626

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

vs.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PICOZZI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 18, 1946
CERTIORARI GRANTED DECEMBER 9, 1946

SUPREME COURT OF THE UNITED STATES

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(Names and addresses of attorneys omitted.)

In the Southern Division of the District Court of the United States for the Northern District of California

Civil Action File No. 22563–G

LEO T. CROWLEY, AS HE IS ALIEN PROPERTY CUSTODIAN, PLAINTIFF

v.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, RUDOLPH WAGNER, AND THE SAN FRANCISCO BANK, AS IT IS EXECUTOR OF THE WILL OF ALVINA WAGNER, DEFENDANT

Complaint

Filed April 6, 1943

1. This action arises under the Act of March 3, 1911; 36 Stat. 1091; U. S. Code, Title 28, Section 41 (1) and under the Act of October 6, 1917; 40 Stat. 425; U. S. Code, Title 50, Appendix, section 17; as hereinafter more fully appears.

2. The plaintiff is Alien Property Custodian.

3. The defendant The San Francisco Bank is a California banking corporation which has its principal place of business in San Francisco, California. It is executor of the will of Alvina Wagner, late of San Francisco, California, who died on or about June 6, 1942. That defendant will hereinafter be referred to as the "defendant executor." The will was admitted to probate on or about June 26, 1942 by the Superior Court of the State of California in and for the City and County of San Francisco. A copy of the will is attached hereto as Exhibit A.

4. The names and residences of the other defendants are as follows: Alvina Allen, Oakland, California, Gertrude Dinwiddie, Tarzana, California, Hilda Pigozzi, Oakland, California, Fred Wagner, Oakland, California, Paul Wagner, Oakland, California, and Rudolph Wagner, Pope Valley, California. Those six defendants will hereinafter be referred to as the "individual defendants."

5. The late Alvina Wagner left ten heirs at law surviving her. Six of those heirs at law are the individual defendants named in paragraph 4. The other four: Paula Knuppel, Olga Kruager, Fritz Wagner, and Paul Wagner, are all nationals of and residing in Germany.

6. On or about December 30, 1942 the individual defendants filed in the Superior Court of the State of California in and for

the city and county of San Francisco, a petition for determination of heirship. A copy of that petition is attached hereto as Exhibit B. That petition has not been heard, and no determination of heirship has been made,

7. On January 23, 1943, in compliance with law, the plaintiff issued Vesting Order No. 762. A copy thereof is attached hereto as Exhibit C.

8. The Vesting Order was filed with the Division of the Federal Register on January 27, 1943, and was published in 8 Federal Register 1252, all in compliance with law.

9. By virtue of the Vesting Order, the plaintiff became the owner of, and entitled to receive in distribution, the entire net estate of the late Alvina Wagner, after payment of expenses of administration, inheritance and estate taxes if any, and debts of the decedent.

10. By virtue of the Vesting Order, the plaintiff became the owner of and entitled to receive in distribution, subject to payment of expenses of administration, inheritance and estate taxes, if any, and debts of the decedent, the real property now in possession of the San Francisco Bank, as it is executor of the Will of Alvina Wagner, decedent, which real property is more particularly described in paragraphs numbered 1, 2, 3 and 4 of page 2 (page 11 of this complaint) of said Vesting Order No. 762, which is attached to this complaint and marked "Exhibit C," reference to which description is hereby made and made a part hereof as though fully set forth herein; all of said property being situated in the City and County of San Francisco, State of California.

Wherefore, the plaintiff demands that a judgment be entered (1) determining that the individual defendants are entitled to no part of the estate, (2) determining that the plaintiff is entitled to the entire net estate after payment of expenses of administration, inheritance and estate taxes if any, and debts of the decedent, (3) determining that the plaintiff is the owner of that certain real property which is more particularly described in paragraphs 1, 2, 3 and 4 of page 2 (page 11 of this compiaint) of Vesting Order No. 762, which is attached to this complaint and marked "Exhibit C," reference to which description is hereby made and made a part thereof as though fully set forth herein, subject to the payment of expenses of administration, inheritance and estate taxes, if any, and debts of the decedent, and (4) ordering the defendant executor to pay the entire net estate to the plaintiff upon the allowance of its final account as executor.

(Signed) FRANK J. HENNESSY,
United States Attorney.

Address: 422 Post Office Building, San Francisco, Calif.

Of counsel
A. MATT WERNER,
General Counsel,
Office of Alien Property Custodian.
(Signed) GEORGE A. McNULTY,
Chief, Alien Property Unit, War Division.
Department of Justice, Washington, D. C.
(Signed) WALLACE H. WALKER,
Attorney, Alien Property Unit War Division.
Department of Justice, Washington, D. C.

6 *Exhibit A to complaint*

I, Alvina Wagner, a resident of San Francisco, California, do make, publish, and declare this to be my last Will and Testament, in the manner following, that is to say:

First. I give, bequeath and devise to my brother, Paul Wagner, my brother, Fritz Wagner, my sister, Olga Kruager and my niece, Paula Knuppel, all of my property, be it real or personal, wheresoever situate, of which I die possessed, and to share equally.

Second. In the event that my said niece, Paula Knuppel, predeceases me, then and in that event the share of my estate so bequeathed and devised to her, I hereby give, bequeath, and devise to her son (whose given name I do not know).

Third. I hereby nominate and appoint The San Francisco Bank, to act as Executor of this my last Will and Testament.

Fourth. I hereby revoke all former Wills by me made.

In witness whereof, I have hereunto set my hand and seal this 23rd day of December 1941.

(Signed) ALVINA WAGNER.

Witness:
(Signed) JOSEPH NUHN,
Residing at 3054 San Bruno Ave.,
San Francisco, Calif.

Witness:
(Signed) ALFRED VOYCE,
Residing at 1239 Polk Street,
San Francisco, California.

7 *Exhibit B to complaint*

In the Superior Court of the State of California
In and For the City and County of San Francisco

Probate No. 90121 Dept. Nine

IN THE MATTER OF THE ESTATE OF ALVINA WAGNER, SOMETIMES KNOWN AS ALVINE WAGNER, SOMETIMES KNOWN AS ALWINA WAGNER, SOMETIMES KNOWN AS ALWINE WAGNER, AND SOMETIMES KNOWN AS ALVINA T. WAGNER, DECEASED

To the Honorable Superior Court Aforesaid:

The petition of Rudolph Wagner, Paul Wagner, Alvina Allen, Fred Wagner, Gertrude Dinwiddie, and Hilda Pigozzi respectfully shows:

I

That Alvina Wagner, also known as Alvine Wagner, also known as Alwina Wagner, also known as Alwine Wagner, and also known as Alvina T. Wagner dies testate on the 6th day of June 1942, in St. Helena, State of California, a resident of San Francisco, California; that subsequently such proceedings were had that on the 26th day of June 1942, the San Francisco Bank was appointed by the aforesaid Superior Court, executor of the estate of said deceased, and that thereafter on said day it qualified as said executor, and that it is now the duly qualified and acting executor of said estate.

8 II

That notice to creditors in the manner required by law has been given and the time to file and present claims against the estate has expired, but the estate is not in a condition to be closed.

III

That your petitioners are nephews and nieces of said decedent and are her heirs; that the other heirs of the said decedent are Paul Wagner, brother; and Fritz Wagner, brother; and Olga Kruager, sister, and Paula Kruppel, niece; that Paul Wagner, Fritz Wagner, Olga Kruager, and Paula Kruppel are citizens and residents of Halle, Germany, and as such not entitled to share in the estate of said decedent; that petitioners are entitled to have the whole of said estate distributed to them.

IV

That said estate consists of separate property, decedent being a single woman at the time of her death.

V

That the said property is described in the Inventory and Appraisement on file herein.

VI

That there are various persons who claim an interest in the estate of the deceased, and that the rights of such persons so claiming an interest in said estate have not been determined by any court of competent jurisdiction.

9 Wherefore, your petitioners pray that the court determine who are entitled to distribution of the Estate of Alvina Wagner, also known as Alvine Wagner, also known as Alwina Wagner, also known as Alwine Wagner, and also known as Alvina T. Wagner, deceased.

S. C. MASTERSON,
Attorney for Petitioners.

STATE OF CALIFORNIA,
County of Contra Costa, ss:

S. C. Masterson, being sworn, says: That he is an attorney at law admitted to practice before all courts of the State of California and has his office in Richmond, Contra Costa County, of California, and is the attorney for petitioners in the above-entitled action; that the petitioners are absent from the county wherein the affiant has his office and for that reason the affiant makes this verification on petitioners' behalf; that he has read the foregoing Petition and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief; and as to those matters he believes it to be true.

S. C. MASTERSON.

Subscribed and sworn to before me this 30th. day of December 1942.

[SEAL]

MABEL D. SOUSA,
Notary Public in and for the
County of Contra Costa, State of California.

10 *Exhibit C to complaint*

OFFICE OF ALIEN PROPERTY CUSTODIAN

WASHINGTON

Vesting Order Number 762

IN RE: ESTATE OF ALVINA WAGNER, DECEASED

(File D-28-4419; E. T. Sec. 1209)

Under the authority of the Trading with the Enemy Act as amended, Executive Order 9095 as amended, and pursuant to

law, the Alien Property Custodian after investigation, finding that—

(1) The property and interests described below in subparagraphs (a) and (b) are property which is in the process of administration by The Francisco Bank, Executor, 526 California Street, San Francisco, California, acting under the judicial supervision of the Superior Court of the State of California, in and for the City and County of San Francisco.

(2) Such property and interests are payable or deliverable to, or claimed by, nationals of a designated enemy country, Germany, namely: Fritz Wagner, Germany; Olga Krauger, Germany; Paula Knuppel, Germany; Paul Wagner, Germany.

11 (3) The property and interests described in subparagraph (b) are property within the United States owned or controlled by the aforesaid nationals of a designated enemy country, Germany; and Determining that—

(4) If such nationals are persons not within any designated enemy country, the national interest of the United States requires that such persons be treated as nationals of a designated enemy country, Germany; and

Having made all determinations and taken all action, after appropriate consultation and certification, required by said Executive Order or Act or otherwise, and deeming it necessary in the national interest,

Now, Therefore, the Alien Property Custodian hereby vests the following property and interests:

(a) All right, title, interest, and claim of any kind or character whatsoever of Fritz Wagner, Olga Grauger, Paula Knuppel, and Paul Wagner, and each of them, in and to the estate of Alvina Wagner, deceased; and

(b) All right, title, interest, and estate, both legal and equitable, of Fritz Wagner, Olga Kruager, Paula Knuppel, and Paul Wagner, and each of them, in and to the real property situated

12 in the City and County of San Francisco, State of California, and described as follows:

(1) Commencing at a point on the southerly line of Geary Boulevard, distance thereon one hundred four feet Easterly from the Easterly line of Fortieth Avenue and running thence Easterly along the said Southerly line of Geary Boulevard twenty-five feet; thence at a right angle Southerly one hundred feet; thence at a right angle Westerly twenty-five feet and thence at a right angle Northerly one hundred feet to the Southerly line of Geary Boulevard and the point of commencement.

The same being a Portion of Outside Land Block No. 245. Together with all improvements and appurtenances thereunto belonging.

(2) Commencing at a point on the Southerly line of Moraga Street, distant thereon fifty-seven feet six inches Easterly from the line of 23rd Avenue; running thence Easterly and along said line of Moraga Street twenty-five feet; thence at a right angle Southerly one hundred feet; thence at a right angle Westerly twenty-five feet; thence at a right angle Northerly one hundred feet to the point of commencement.

13 Being a part of Outside Land Block No. 882. Together with all improvements and appurtenances thereunto belonging.

(3) Beginning at a point on the Westerly line of 41st Avenue, distant thereon seventy-five feet Southerly from the Southerly line of Anza Street; running thence Southerly along said line of 41st Avenue twenty-five feet; thence at a right angle Westerly eighty-one feet six inches; thence at a right angle northerly twenty-five feet; thence at a right angle Easterly eighty-one feet six inches to the point of beginning.

Being a portion of Outside Land Block No. 324. Together with all improvements and appurtenances thereunto belonging.

(4) Beginning at a point on the Westerly line of Seventeenth Avenue distant thereon three hundred and four feet Southerly from the Southerly line of Kirkham Street, formerly "K" Street, and running thence Southerly along said line of Seventeenth Avenue twenty-five feet; thence at right angles Westerly one hundred and twenty feet; thence at right angles Northerly twenty-five feet; thence at right angles Easterly one hundred and twenty feet to the point of beginning.

14 Being a portion of Outside Land Block No. 785. Together with all improvements and appurtenances thereunto belonging, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

Such property and interests and any or all of the proceeds thereof shall be held in a special account pending further determination of the Alien Property Custodian. This shall not be deemed to limit the powers of the Alien Property Custodian to return such property and interests or the proceeds thereof, or to indicate that compensation will not be paid in lieu thereof, if any when it should be determined that such return should be made or such compensation should be paid.

Any person, except a national of a designated enemy country, asserting any claim arising as a result of this order may file with the Alien Property Custodian a notice of his claim, together with a request for a hearing thereon, on Form APC–1, within one year from the date hereof, or within such further time as may be allowed by the Alien Property Custodian.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in Section 10 of said Executive Order.

Dated January 23, 1943.

[OFFICIAL SEAL] (Signed) Leo T. Crowley,
LEO T. CROWLEY,
Alien Property Custodian.

Certified to be a true copy of the original.

(Signed) Francis A. Mahony,
FRANCIS A. MAHONY,
Secretary,
Office of Alien Property Custodian.

[File endorsement omitted.]

In United States District Court

Motion to strike

Filed May 25, 1943

Come now the defendants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner, and move the Court for an Order to strike the complaint on file herein on the following ground:

That this Court has no jurisdiction over the subject matter in this action.

S. C. MASTERSON,
Attorney for Said Defendants:

337 Tenth Street, Richmond, California, Richmond 4161.

Copies mailed this date to:

(1) The San Francisco Bank, 526 California Street, San Francisco, California.

(2) Frank J. Hennessy, United States Attorney, 422 Post Office Building, San Francisco, California.

(3) A. Matt Werner, General Counsel, Office of Alien Property Custodian, Washington, D. C.

(4) George A. McNulty, Chief, Alien Property Unit, War Division, Department of Justice, Washington, D. C.

(5) Wallace H. Walker, Attorney, Alien Property Unit, War Division, Department of Justice, Washington, D. C.

Dated May 25, 1943.

S. C. MASTERSON.

[File endorsement omitted.]

In United States District Court

Answer of defendant, the San Francisco Bank

Filed May 28, 1943

The San Francisco Bank, one of the defendants in this action, answers the complaint as follows:

1. This defendant admits the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, and 8 of the complaint.

17 2. Answering the allegations of paragraphs 9 and 10 of the complaint, this defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth thereof.

This defendant alleges further that the other defendants claim and assert that they are the owners of and entitled to distribution of the net estate and the real property mentioned in paragraphs 9 and 10 of the complaint, respectively, to the exclusion of plaintiff; that the claims of those defendants are adverse to and in conflict with the claim of plaintiff; that this defendant has no knowledge or belief which enables it to determine, and this defendant is unable to determine, whether in law and in fact plaintiff is the owner of and entitled to receive distribution of the net estate and the real property mentioned in paragraphs 9 and 10 of the complaint, respectively, or whether in law and in fact the other defendants are the owners thereof and entitled to receive distribution thereof.

Wherefore, this defendant prays that a judgment be entered (1) determining who, of the parties to this action, is the owner of and entitled to distribution of the net estate and the real property mentioned in the complaint, subject to the payment of expenses of administration, inheritance and estate taxes and debts of the decedent; (2) discharging this defendant from all liability except to the person or persons the court shall adjudge

18 to be owner or owners thereof and entitled to distribution thereof, and (3) directing and aiding this defendant in the premises.

JACKSON MADDUX,
Attorney for defendant The San Francisco Bank,
Executor of the Will of Alvina Wagner.

[File endorsement omitted.]

In United States District Court

Answer and cross-claim

Filed July 8, 1943

Come now the defendants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner and answer the complaint on file herein as follows:

First Defense

I

The complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

I

That this Court has no jurisdiction over the subject matter in this action.

Third Defense

I

Defendants above-named admit the allegations contained in paragraphs 2, 3, 4, 5, and 6 of the complaint; allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 7 and 8 of the complaint; deny each and every other allegation contained in the complaint.

Cross-Claim

I

That Alvina Wagner, also known as Alvine Wagner, also known as Alwina Wagner, also known as Alwine Wagner, and also known as Alvina T. Wagner died testate on the 6th day of June 1942, in St. Helena, State of California, a resident of San Francisco, California; that subsequently such proceedings were had that on the 26th of June 1942, the San Francisco Bank was appointed by the Superior Court of the State of California In and For the City and County of San Francisco, executor of the estate of said deceased, and that thereafter on said day said San Francisco Bank qualified as said executor, and that it is now the duly qualified and acting executor of said estate.

II

That the Last Will and Testament of said Alvina Wagner was admitted to probate on June 26, 1942 in the Superior Court of the State of California In and For the City and County of San Francisco in that certain matter entitled "In the Matter of the Estate of Alvina Wagner" and given probate file number 90121; that in said Last Will and Testament said Alvina Wagner gave, bequeathed and devised all of her property to Paul Wagner, brother, Fritz Wagner, brother, Olga Kruager, sister, and Paula Knuppel, niece; that said persons survived said testator; that said persons are, and were at all times mentioned herein, citizens and residents of Germany.

III

That under the laws of the State of California said Paul Wagner, Fritz Wagner, Olga Kruager and Paula Knuppel are persons ineligible to take either real or personal property or the proceeds thereof by inheritance or testamentary disposition.

IV

That the defendants Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner and Rudolph Wagner are the heirs at law of said Alvina Wagner and under the laws of the State of California are entitled to the distribution of the whole of the estate of said Alvina Wagner.

V

That the estate of the said Alvina Wagner consists of the following property:

(a) Personal Property

Bank Deposits as follows:

The San Francisco Bank	$83.58
Bank of America	88.22
Wells-Fargo National Bank	27.06
1928 Hupmobile auto, value	15.00
Furniture at 834 Urbano Drive, San Francisco, California, value	250.00
Furniture at 7525 Geary Street, San Francisco, California, value	20.00
Silverware and Jewelry, value	125.00

(b) Real Property

All that real property situated in the City and County of San Francisco, State of California, and described as follows:

(1) Commencing at a point on the southerly line of Geary Boulevard, distant thereon one hundred four feet Easterly from the Easterly line of Fortieth Avenue and running thence Easterly and along the said Southerly line of Geary Boulevard twenty-five feet; thence at a right angle Southerly one hundred feet; thence at a right angle Westerly twenty-five feet and thence at a right angle Northerly one hundred feet to the Southerly line of Geary Boulevard and the point of commencement.

The same being a portion of Outside Land Block No. 245. Together with all improvements and appurtenances thereunto belonging.

(2) Commencing at a point on the Southerly line of Moraga Street, distant thereon fifty-seven feet six inches Easterly from the Easterly line of 23rd Avenue; running thence Easterly and along said line of Moraga Street twenty-five feet; thence at a right angle Southerly one hundred feet; thence at a right angle
22 Westerly twenty-five feet; thence at a right angle Northerly one hundred feet to the point of commencement.

Being a part of Outside Land Block No. 882.

Together with all improvements and appurtenances thereunto belonging.

(3) Beginning at a point on the Westerly line of 41st Avenue, distant thereon seventy-five feet Southerly from the Southerly line of Anza Street; running thence Southerly along said line of 41st Avenue twenty-five feet; thence at a right angle Westerly eighty-one feet six inches; thence at a right angle Northerly twenty-five feet; thence at a right angle Easterly eighty-one feet six inches to the point of beginning.

Being a portion of Outside Land Block No. 324. Together with all improvements and appurtenances thereunto belonging.

(4) Beginning at a point on the Westerly line of Seventeenth
a Avenue distant thereon three hundred and four feet Southerly from the Southerly line of Kirkham Street, formerly "K" Street, and running thence Southerly along said line of Seventeenth Avenue twenty-five feet; thence at right angles Westerly one hundred and twenty feet; thence at right angles Northerly
23 twenty-five feet; thence at right angles Easterly one hundred and twenty feet to the point of beginning.

Being a portion of Outside Land Block No. 785. Together with all improvements and appurtenances thereunto belonging.

Wherefore, defendants above-named pray judgment that plaintiff take nothing by his complaint; that the Court determine it has no jurisdiction over the subject matter herein; that the Court determine that the defendants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner

are entitled to distribution of the whole of the estate of said Alvina Wagner; and for such other and further relief as to the Court seems equitable.

S. C. MASTERSON,
Attorney for Defendants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner.

STATE OF CALIFORNIA,
County of Contra Costa, ss:

S. C. Masterson, being sworn, says: That he is an attorney at law admitted to practice before all courts of the State of California, and has his office in Richmond, Contra Costa County, California, and is the attorney for defendants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner in the above entitled action; that defendants are unable to make the verification because they are absent
24 from said county and for that reason affiant makes this verification on defendants' behalf; that he has read the foregoing Answer and Cross-Claim and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief; and as to those matters he believes it to be true.

S. C. MASTERSON.

Subscribed and sworn to before me this 7 day of July 1943.
[SEAL]
A. A. ALSTROM,
Notary Public in and for the County of Contra Costa, State of California.

Copies mailed to:
(1) Frank J. Hennessy, 422 Post Office Building, San Francisco, California, Attention: Wilber Mathewson.
(2) A. Matt Werner, General Counsel, Office of Alien Property Custodian, Washington, D. C.
(3) George A. McNulty, Chief, Alien Property Unit, War Division, Department of Justice, Washington, D. C., Attention: Wallace H. Walker.
(4) The San Francisco Bank, 526 California Street, San Francisco, California.

[File endorsement omitted.]

25 In United States District Court

Notice of motion for judgment

Filed July 26, 1943

To S. C. MASTERSON, Esq.,
Attorney at law, Room 105 Syndicate Bldg., 337 10th Street, Richmond, California:

JACKSON MADDUX, Esq.,
Attorney at law, 333 Montgomery Street, San Francisco, California:

ROBERT W. KENNY,
Attorney General for the State of California, State Building, San Francisco, California:

Please take notice that on Saturday, July 31, 1943, at the hour of 10:00 A. M. in the Courtroom of Judge Louis E. Goodman, Post Office Building, San Francisco, the plaintiff above-named will move the Honorable Court for judgment on the pleadings in the above-entitled case as against all of the defendants. A copy of the said Motion is enclosed herewith.

Dated July 24, 1943.

FRANK J. HENNESSY,
United States Attorney.
By W. E. LICKING,
Ass't U. S. Atty.

26 In United States District Court

Plaintiff's motion for judgment on the pleadings

Filed July 26, 1943

The plaintiff moves the court for judgment on the pleadings against all defendants herein.

FRANK J. HENNESSY,
United States Attorney,
7th and Mission Streets, San Francisco, California.
GEORGE A. McNULTY,
Chief, Alien Property Unit, War Division,
Department of Justice, Washington, D. C.
Attorneys for the plaintiff.

[File endorsement omitted.]

27 In United States District Court

Order for Judgment

November 17, 1943

The motion to strike complaint and the motion of the plaintiff for summary judgment having been heretofore heard and submitted, being now fully considered, and the Court having filed its written opinion thereon, it is Ordered, in accordance with said opinion, that the motion to strike the complaint be and the same is hereby denied; that the motion of the plaintiff for summary judgment be and the same is hereby granted, and that a decree be entered herein granting the relief prayed for by plaintiff.

29 In United States District Court.

Opinion

Filed Nov. 17, 1943

GOODMAN, District Judge.

Alvina Wagner, a resident of California, died June 6, 1942. By her last Will and Testament, dated December 23, 1941, and admitted to probate in the Superior Court of the State of California June 26, 1942, she bequeathed all her property, (several parcels of real property in San Francisco, California, and some personal property of minor value) to two brothers, one sister and one niece, all nationals and residents of Germany. Six nieces and nephews, residents of California, petitioned the Superior Court as heirs of decedent for distribution of the estate to them, claiming that the German legatees were ineligible as beneficiaries under Sections 259, 259.1 and 259.2 of the California Probate Code (effective July 1, 1941), which in substance provides that the right of aliens abroad to take real or personal property in the United States by will or descent, is conditioned upon the existence of a reciprocal right of Americans abroad and that such reciprocal right being absent, American heirs take. No determination of heirship has been made by the Superior Court.

On January 23, 1943, the plaintiff Alien Property
30 Custodian, under the authority of Section 5 (b) of the Trading with the Enemy Act, as amended by Title III of The First War Powers Act, 1941, and Executive Order 9095 of July 6, 1942, by vesting order 762, vested in himself for the use of the United States all the right, title, and interest of the German legatees in the estate of Alvina Wagner.

On April 6, 1943, plaintiff as Alien Property Custodian filed this action against The San Francisco Bank as executor of the Wagner Will and the six claimant heirs, for a judgment vesting ownership of the property of the estate, subject to the payment of administration expenses, inheritance and estate taxes and debts of decedent, in plaintiff and determining that defendant heirs have no right or claim thereto and ordering defendant executor to deliver over the net estate to plaintiff.

By separate answers, the defendant executor and the individual defendants claim lack of jurisdiction of this Court and allege that the individual defendants are entitled to inherit the property of the estate under California law. Defendants move to strike the complaint for lack of jurisdiction. Plaintiff moves for summary judgment in favor of plaintiff. *Both motions have been argued and submitted. All parties agree that no question of fact is involved and that the cause may be determined on the motions submitted.

The issues presented for determination are:

1. Has this court jurisdiction of the subject matter?

31 2. Is the cited California probate statute constitutional? If it is not, the property in probate should vest in plaintiff.

Plaintiff invokes the jurisdiction of this Court under 36 Stat. 1091; 28 U. S. C. A. 41(1), being "a suit of civil nature * * * in equity, brought by the United States or by any officer thereof authorized by law to sue," and the Trading with the Enemy Act (40 Stat. 411) 50 U. S. C. A. Appendix Sec. 17 (40 Stat. 425), whereby the District Courts "are given jurisdiction to make and enter * * * all such orders and decrees and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act."

Defendants and amici curiae claim lack of jurisdiction asserting the action is in rem to determine title to property and would oust the state court of previously acquired jurisdiction of the res. (citing U. S. v. Bank of New York Co. 296 U. S. 463.)

Section 5 (b), the pertinent provision of the Trading with the Enemy Act, provides as follows:

"During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses or otherwise—

* * * * *

*Rule 56 Rules of Civil Procedure.

"B. investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use,
32 transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power or privilege with respect to, or transactions involving any property in which any foreign country or a national thereof has an interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President; in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States. * * *"

The Trading with the Enemy Act was originally enacted October 6, 1917, c. 106, 40 Stat. 411, was twice amended in 1918 (40 Stat. 459; 40 Stat. 1020; again amended in 1919 (41 Stat. 35); again amended in 1920 (41 Stat. 977); again amended in May 1940 (54 Stat. 179) and once more on December 18, 1941 by the First War Powers Act (55 Stat. 839). It is strictly a war measure, finding its authority in Art. 1, § 8, Cl. 11 of the Constitution. Brown v. U. S., 8 Cranch 109; Miller v. U. S., 11 Wall. 268. By its terms, the President is granted wide authority to sequester, administer and dispose of alien enemy property in the United States and to proceed summarily and promptly to that end.
43 The judicial power, when properly invoked, under the Statute, should function in like manner.

Art. 1, sec. 8, cl. 11 of the Constitution empowers the Congress: "to declare war, grant letters of marque and reprisal and make rules concerning captures on land and water." The powers granted to the President in the Trading with the Enemy Act include the power to make "captures" on land. The sequestering of alien enemy property under vesting orders by the Alien Property Custodian, who is the President's agent, is in the nature of a "capture" under Art. 1 sec 8 cl. 11 of the Constitution. Shoehr v. Wallace, 255 U. S. 239, 242.

The important question here presented is whether Federal jurisdiction in aid of the enforcement of this war statute, cannot be invoked because the property, sought to be vested, is in course of probate in the State court.

The jurisdiction of the Federal Courts is derived from the Constitution and Congressional enactments. It is not subject to restriction or ouster by State legislation e. g. State probate procedural statutes. (Miami County Natl. Bank v. Bancroft, 121 Fed. (2d) 921, 10 Cir.) Payne v. Hook, 7 Wall. 425.

It is clear to me that the Congress intended that alien property in the United States should be "frozen" wherever found and held and administered only in the interest of and for the benefit of the United States. A complete Federal dominance in every respect over alien rights and property, to the exclusion of
34 state or local agencies, was obviously purposed. Economic warfare, as an aid to the defeat of the enemy, can only be effective if it is centralized and possesses over-all control.

It follows that the Federal Courts, granted by the Congress the power to issue decree and process in aid of the statute, have jurisdiction to enforce by decree, vesting orders of the Alien Property Custodian.

It if appeared that the property bequeathed was unquestionably vested in United States citizens resident in California, then obviously there would be no basis for claiming Federal jurisdiction. Here, however, the validity of the State statute under which the California heirs make claim, is in issue and this, itself, furnishes the grounds for Federal jurisdiction.

The California statute (Probate Code 259, 259.1 and 259.2) reads:

"§ 259. Aliens residing abroad: Dependance of rights upon reciprocity. The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are
35 inhabitants and citizens and upon the rights of citizens *and upon the rights of citizens* of the United States to receive by payment to them within the United States, or its territories money originating from the estates of persons dying within such foreign countries. (Added by Stats. 1941, Ch. 895 § 1; effective July 1, 1941.)

§ 259.1. Same: Burden of establishing that rights are reciprocal. The burden shal lbe upon such nonresident alies to establish the fact of existence of the reciprocal rights set forth in Section 259. (Added by Stats. 1941, Ch. 895, § 1; Effective July 1, 1941.)

"§ 259.2. Same: Disposition of property on finding of nonreciprocity. If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property." (Added by Stats. 1941, ch. 895, § 1; Effective July 1, 1941.)

By the foregoing statute, California attempted to enter a field of exclusive Federal jurisdiction.

It is contended by defendants that the Probate Statute is a mere pronouncement of a rule of succession and testamentary disposition. That such is not the fact appears conclusively from the enabling clause which discloses the purpose of the statute to be:

"SEC. 2. This act is hereby declared to be an urgency measure necessary for the immediate preservation of the public
36 peace, health and safety within the meaning of Section 1 of Article IV of the Constitution of the State of California, and shall take effect immediately. The following is a statement of the facts constituting such necessity:

A great number of foreign nations are either at war, preparing for war or under the control and domination of conquering nations with the result that money and property left to citizens of California is impounded in such foreign countries or taken by confiscatory taxes for war uses. Likewise money and property left to friends and relatives in such foreign countries by persons dying in California is often never received by such nonresident aliens but is seized by these foreign governments and used for war purposes. *Because the foreign governments guilty of these practices constitute a direct threat to the Government of the United States, it is immediately necessary that the property and money of citizens dying in this country should remain in this country and not be sent to such foreign countries to be used for the purposes of waging a war that eventually may be directed against the Government of the United States.*"

The emphasized portions of the above "purpose" clause disclose that the California State Legislature did not adopt the probate statute as an orthodox procedural rule to regulate succession to property in the ordinary course.

37 To the contrary, the expressed design was to fix a policy of international relations, which, the Legislature thought, would aid the United States in anticipated hostilities with a foreign government. If this were a valid exercise of state authority, by the same token, it could regulate aliens in other respects, by requiring registration, payment of fees, etc.—all matters within the exclusive Federal field (Hines v. Davidowitz, post.) Granted the patriotic impulse prompting the enactment of the State statute, nevertheless it invades the Federal field.

The Attorney General of California and other amici curiae argue that plaintiff's vesting order has no res to which to attach itself, inasmuch as under the California Probate Code, the title to the real estate involved is already vested in California heirs. If it appeared from the record that the title to the property was unquestionable, the point might be good. Here, however, the

property was willed to alien nationals, and, but for the cited probate section, would so pass.

The Attorney General contends that in determining the issue presented, this court unlawfully enters the domain of State probate procedure. I do not find this to be so. The relief besought asks no more than a determination vesting the interests of the aliens in the Alien Property Custodian. The State probate procedure itself is to be untouched. See Commonwealth v. Bradford, 297 U. S. 613.

The California statute is invalid and unconstitutional because the State of California attempted, by the probate statute
38 in question, to enter the field of foreign relations, a domain reserved exclusively to the Federal government, free from local interference. United States v. Curtiss-Wright Export Corporation, 299 U. S. 304; U. S. v. Belmont, 301 U. S. 324.

At the time the California statute was adopted (July 1941) there was in effect, between the United States and Germany, a treaty providing for reciprocity of inheritance rights between the two nations. (Treaty of Friendship, Commerce and Consular Rights, dated December 8, 1923; ratification exchanged October 14, 1925; proclaimed October 14, 1925; 44 Stat. (part 3) 2132).

Prior to the adoption of the California statute, the Congress had in May 1940 amended the Trading with the Enemy Act to provide for "freezing" control over financial transactions.

It is contended that the Treaty above referred to was abrogated by war (December 7, 1941) and hence California was free to enter the field. Head Money Cases, 112 U. S. 580; Society for Propogation of Gospel v. New Haven, 8 Wheat. 464. It is not beyond question that war did in fact abrogate the treaty. Assuming that it did, by the amendment of the Trading with the Enemy Act in May 1940, the Congress clearly evidenced the intent that the Federal Government should occupy the field to the exclusion of State or local legislation. In Hines v. Davidowitz, 312 U. S. 52, at 62, Mr. Justice Murphy clearly states that:

"When the national government by treaty or statute has
39 established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land * * * The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties * * * Our system of government is such that the interest of the cities, counties, and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."

cf. Chy Lung v. Freeman, 92 U. S. 275, 279.

The Attorney General of California urges that the California Probate Court is a properly equipped and functioning court fully qualified to determine the questions presented in due course and that the Federal Court should "decline" jurisdiction. In view of what has been said infra re the authority and power granted to the President under the Trading with the Enemy Act and the mandate to the Federal Court to issue decrees and process in aid thereof, it is my view the jurisdiction should be exercised, not declined.

Neither a desire to deprive California heirs of property vesting in them under the existing California law nor a purpose to increase the holdings of plaintiff as Alien Property Custodian has any part in this decision. That California heirs, in preference
40 to alien enemies, cannot succeed to the property of this estate is perhaps regrettable. However, the decision herein must rest on broader grounds.

If the limitation of the powers of the state were not sustained in principle, evils now incapable of definition would result from state entry into the Federal field.

My conclusion is that this court has jurisdiction. Having jurisdiction, the court determines that the state probate act is unconstitutional, being an invasion of the Federal province.

The motion to strike the complaint is denied. The motion of the plaintiff for summary judgment is granted and a decree will enter granting the relief prayed for by plaintiff.

Dated November 17th, 1943.

In the Southern Division of the United States District Court for the Northern District of California

No. 22563–G

LEO T. CROWLEY, AS ALIEN PROPERTY CUSTODIAN, PLAINTIFF

vs.

ALVINA ALLEN, AND OTHERS, DEFENDANTS

Judgment

Filed Dec. 28, 1943

This cause came on to be heard on the plaintiff's motion for
41 judgment on the pleadings and on the motions of the defendants Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner (which de-

fendants will, for convenience, be hereinafter designated as "the six defendant heirs") to strike the complaint and to dismiss the complaint, and was argued by counsel for the parties, and briefs were submitted by counsel for the parties and by various amici curiae. Upon consideration thereof it appears to the court that the plaintiff is entitled to judgment in his favor on the undisputed facts in the pleadings.

It is therefore ordered, adjudged and decreed as follows:

1. The plaintiff's motion for judgment on the pleadings is granted.

2. The motion of the six defendant heirs to strike the complaint is denied.

3. The motion of the six defendant heirs to dismiss the complaint is denied.

4. The provisions of California Statutes 1941, Chapter 895, which amended the California Probate Code by adding Sections 259, 259.1, and 259.2 contravene the provisions of Article I, Section 8, Clause 11 of the Constitution of the United States, and are therefore invalid.

5. That statute also invades, and interferes with the exercise of, the Federal Government's power over foreign affairs, and is therefore invalid.

6. The devises and legacies given by the will of Alvina Wagner, deceased, to Paula Knuppel, Olga Kruager, Fritz Wagner,
42 and Paul Wagner, are valid. Upon the death of that testatrix, title to her estate vested in those devisees and legatees, subject to administration and to the payment of expenses of adminisration, debts, and taxes.

7. By virtue of Vesting Order No. 762, issued by the plaintiff as Alien Property Custodian on January 23, 1943, the plaintiff acquired all right, title, interest and claim of the aforenamed devisees and legatees in and to the estate of the late Alvina Wagner.

8. None of the six individual defendants has any right, title or interest in or to the estate of the late Alvina Wagner.

9. The plaintiff is entitled to receive the net estate of the late Alvina Wagner in distribution, after the payment of expenses of administration, debts, and taxes.

Dated this 28th day of December 1943.

LOUIS GOODMAN, *District Judge.*

[File endorsement omitted.]

43 In United States District Court

Notice of entry of judgment

To FRANK J. HENNESSY, Esq.
GEO. A. MCNULTY, Esq.
WALLACE H. WALKER, Esq.
HARRY LEROY JONES, Esq.
A. MATT WERNER, Esq.
S. C. MASTERSON, Esq.
JACKSON MADDUX, Esq.
MATT WAHRHAFTIG, Esq.
H. W. FALK, Jr., Esq.
ROBERT W. KENNY, Esq., *Attorney General.*
R. A. WESTPHAL, Jr., Esq., *Deputy.*

You are hereby notified that on December 28, 1943, a Judgment was entered of record in this office in the above-entitled case.

G. W. GALBREATH,
Clerk, U. S. District Court.
lj.

SAN FRANCISCO, CALIFORNIA, *December 29, 1943.*
Notice Mailed of Entry of Judgment on Dec. 29, 1943.

In United States District Court

Notice of appeal to Circuit Court of Appeals

Filed March 27, 1944

Notice is hereby given that Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph
44 Wagner, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on December 28, 1943.

S. C. MASTERSON,
Attorney for Appellants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner, 337 Tenth Street, Richmond, California.

[File endorsement omitted.]

In United States District Court

Designation of record on appeal

Filed March 27, 1944

The following is hereby designated as the record on appeal:

(1) Complaint and exhibits thereto.
(2) Defendant's Motion to Strike.
(3) Answer and Cross-Claim of Defendants Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner.
(4) Plaintiff's Motion for Judgment on Pleadings.
(5) Notice to Enter Judgment.
(6) The Opinion of Judge Goodman.
(7) The Judgment.
(8) Notice of Entry of Judgment.
(9) Notice of Appeal.
45 (10) Designation of Record on Appeal.
(11) Statement of Points.

S. C. MASTERSON,
Attorney for Defendants Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner, 337 Tenth Street, Richmond, California.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Statement of points

Filed March 27, 1944

The following is a statement of the points upon which the appellants intend to reply upon this appeal:

(1) That the Federal Court has no jurisdiction over the subject matter.

(2) That California Probate Code section 259; 259.1, and 259.2 are constitutional and valid and apply to the property involved herein.

(3) That the Treaty of Friendship, Commerce and Consular Rights of 1925 with Germany does not abrogate the right of the state of California to regulate succession and testamentary disposition of either (a) personal property or (b) real property.

(4) That the Treaty of Friendship, Commerce and Consular Rights of 1925 with Germany is either abrogated or suspended by war between the contracting powers.

46 (5) The California statute (Calif. Probate Code sec. 259) speaks as of the date of death of the testatrix and the non-resident alien enemies acquired no interest which the Alien Property Custodian could vest.

(6) That the Trading with the Enemy Act, as amended, and the Executive Orders made thereunder suspended the Treaty of Friendship, Commerce and Consular Rights of 1925 with Germany.

S. C. MASTERSON,
Attorney for Appellants,
337 Tenth Street, Richmond, California.

[File endorsement omitted.]

[Clerk's certificate to foregoing transcript omitted in printing.]

48 In the Circuit Court of Appeals of the United States in and for the Ninth Circuit

No. 10760

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, AND RUDOLPH WAGNER, APPELLANTS

vs.

LEO T. CROWLEY, AS HE IS ALIEN PROPERTY CUSTODIAN, APPELLEE

Adoption of designation of record and statement of points

Filed May 10, 1944

I hereby adopt the Designation of Record and Statement of Points filed in the District Court as a compliance with the provisions of Rule 19 of the Rules of this Court.

S. C. MASTERSON,
Attorney for Appellants,
337 Tenth Street, Richmond, California.

[File endorsement omitted.]

49 In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10760.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER AND RUDOLPH WAGNER, APPELLANTS

vs.

LEO T. CROWLEY, AS HE IS ALIEN PROPERTY CUSTODIAN, APPELLEE

Order of substitution of appellee

Filed August 17, 1944

Leo T. Crowley having resigned as Alien Property Custodian of the United States on March 27, 1944, and James E. Markham having succeeded to the office of Alien Property Custodian by appointment of the President on March 27, 1944, and having consented to his substitution as appellee in place of Leo T. Crowley,

It is hereby ordered this 17th day of August 1944, that James E. Markham as Alien Property Custodian be substituted as appellee in the place of said Leo T. Crowley.

CURTIS D. WILBUR,
Judge of the Above-Entitled Court.

We hereby consent to the making and entry of the foregoing order.

James E. Markham,
JAMES E. MARKHAM,
Alien Property Custodian of the United States,
Frank J. Hennessy;
FRANK J. HENNESSY,
United States Attorney,
W. E. Licking,
W. E. LICKING,
Assistant United States Attorney,
Attorneys for Plaintiff and Appellee.
S. C. Masterson,
S. C. MASTERSON,
Jackson Maddux,
JACKSON MADDUX,
Attorneys for Defendants and Appellants.

[File endorsement omitted.]

51 In United States Circuit Court of Appeals for the Ninth Circuit

[Title omitted.]

Order directing filing of mandate of Supreme Court of the United States, and resubmitting cause

March 12, 1946.

The mandate of the Supreme Court of the United States in above cause having been received, it is ordered that such mandate be forthwith filed by the clerk of this Court.

It is further ordered that this cause be, and hereby is resubmitted to the Court for consideration and decision, with leave to counsel for appellant to file a further brief, if so advised, within 20 days from date.

52 *Mandate of Supreme Court of the United States*

UNITED STATES OF AMERICA, *ss:*

The PRESIDENT OF THE UNITED STATES OF AMERICA,

[SEAL]

To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, greeting:

Whereas, lately in the United States Circuit Court of Appeals for the Ninth Circuit, before you, or some of you, in a cause between Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, et al., Appellants, and James E. Markham, as He Is Alien Property Custodian, Appellee, No. 10760, wherein the judgment of the said Circuit Court of Appeals, entered in said cause on the 24th day of January A. D. 1945, is in the following words, viz:

"This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted:

"On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the judgment of the said District Court in this cause be, and hereby is, reversed, and that this cause be, and hereby is remanded to the said District Court with directions to dismiss the case," as by the inspection of the transcript of the record of the said Circuit Court of Appeals, which was brought into the Supreme Court of the United States by virtue of a writ of certiorari, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and forty-five, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Circuit Court of Appeals, in this cause be, and the same is hereby, reversed;

53 And it is further ordered that this cause be, and the same is hereby remanded to the said Circuit Court of Appeals for further proceedings in conformity with the opinion of this Court.

January 7, 1946

You, therefore are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding.

Witness, the Honorable Harlan F. Stone, Chief Justice of the United States, the fifteenth day of February, in the year of our Lord one thousand nine hundred and forty-six.

CHARLES ELMORE CROPLEY,
Clerk of the Supreme Court of the United States.

(Endorsed:) Filed: March 12, 1946. Paul P. O'Brien, Clerk.

54 In the United States Circuit Court of Appeals for the Ninth Circuit

[Title omitted.]

Order directing filing of opinion and filing and recording of decree

May 22, 1946

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

55 In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10760—May 22, 1946

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, AND RUDOLPH WAGNER, APPELLANTS

vs.

JAMES E. MARKHAM, AS HE IS ALIEN PROPERTY CUSTODIAN, APPELLEE

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Opinion

Filed May 22, 1946

Before: GARRECHT, STEPHENS and WILBUR, Circuit Judges

WILBUR, C. J.

This is an appeal from a judgment of the United States District Court of the Northern District, Southern Division of California, entered upon the pleadings. The action was brought by the Alien Property Custodian against six American heirs at law of Alvina Wagner, deceased, residents of California, who are appealing from the judgment against them. The controversy is over the right to the property left by Alvina Wagner, a resident of San Francisco, California, citizenship not alleged, who died June 6, 1942, in San Francisco, leaving real and personal property in California, which she devised and bequeathed, share and share alike, to her four relatives, who were residents and citizens of Germany, consisting of two brothers, a sister and a niece. The American heir claimants who were disinherited consisted of three nephews and three nieces. The will had no residuary disposal. The Alien Property Custodian claims that the will of the testatrix upon her death vested the property of the deceased in the German devisees and legatees named in the will, while the disinherited heirs claim that the will is ineffective because of the
56 alienage of the non-resident devisees and legatees. In short the appellants claim the property under the laws of succession of the State of California wherein the property is located, while the Alien Property Custodian claims that under the laws of the United States the property has vested in him. The Alien Property Custodian contends that the California Statute,

Chapter 895, California Statutes of 1941, Probate Code, §§ 259, 259.1, 259.2, which the California heirs rely upon, is void because in conflict with the Constitution of the United States in that it invades the field of foreign relations and war powers of the United States. The appellants on the other hand contend that Article IV of the German American Treaty of 1925 upon which the Alien Property Custodian relies was abrogated or suspended by the war with Germany, and also by the very same laws and proclamations upon which the Alien Property Custodian relies for his title.

The estate of the deceased herein involved is in due course under probate in the Superior Court in and for the city and county of San Francisco, California, wherein the will of the decedent has been probated and a proceeding in rem has been instituted by the California heirs to determine "who are entitled to distribution of the estate" in which "any person may appear and file a written statement setting forth his interest in the estate." When this suit was instituted in the District Court, the California heirs claimed that the California court sitting in probate had exclusive jurisdiction of the matter. The District Court sustained its jurisdiction, 52 F. Supp. 850, and without consideration of the merits of the case we reversed the District Court. 147 F. 2d 136. On certiorari, the Supreme Court sustained the jurisdiction of the District Court, — U. S. — (January 7, 1946), on the ground that the action was one of a kind within the equity jurisdiction of the English Court of Chancery in 1789, and hence was vested in the District Court by the Judiciary Act of 1789, now Judicial Code Section 24 (1) thereof, giving equity jurisdiction to the District Courts, and also by a special provision in the Trading With the Enemy Act § 17, giving such jurisdiction in matters arising under that Act.

The case was remanded to this court for decision upon the merits. A further statement of the admitted facts and of the proceedings involved in the controversy is necessary. In
37 1923, a treaty between the United States and Germany was negotiated and signed which was ratified and made effective on October 14, 1925. This treaty contained an agreement relating to reciprocal rights to inherit or take real and personal property of a decedent. (Treaty Article IV.) These provisions conformed in a general way to the provisions of the Treaty of 1828 with Prussia, 8 Stat. 378, 384, before World War I and to treaties entered into by the United States with other powers.

The conduct of the parties to the earlier treaty of 1828, during and after World War I is relevant to the interpretation of the similar treaty of 1925 under the conditions of World War II; hence

See footnotes on p. 39.

we state additional facts concerning World War I and its aftermath. On July 2, 1921, after the Armistice of November 11,
58 1918, but while we were still in a state of war with Germany, Congress passed a joint resolution (42 Stat. 106), providing that property of Germany or German Nationals seized or held or demanded by the United States or its officers on or after April 6, 1917, and similarly of Austria-Hungary on and after December 7, 1917, should be retained until disposed of as provided by law.[3]

59 This was followed by the Treaty of Berlin of 1921 which expressly ratified and adopted the provisions of the joint resolutions of July 2, 1921, supra. The Treaty of Versailles, section 289, also provided for revival of pre-war treaties at the

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[1] The Trading with the Enemy Act (40 Stat. 411 enacted in 1917 was amended in 917, 40 Stat. 459, 460; in 1919 by 41 Stat. 35, 36; in 1920 by 41 Stat. 977; on May 1940, 54 Stat. 179; on December 17, 1941, 55 Stat. 839.

[2] The Treaty of 1925 with Germany, see 44 Stat. 2132, and Article IV thereof at page 2135; the Treaty of 1921 with Germany, see 42 Stat. 1939.

[3] Article IV of the Treaty of 1925 reads: "Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein, would, by the laws of the country or a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or nonresident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

"Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees, and donees, of whatsoever nationality, whether resident or nonresident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain and dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases."

[4] Section 5. All property of the Imperial German Government or its successor or successors, and of all German nationals which was, on April 6, 1917, in or since that date come into the possession or under the control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever, and all property of the Imperial and Royal Austro-Hungarian Government, or its successor or successors, and all the Austro-Hungarian nationals which was on December 7, 1917, in or has since that date come into the possession or under the control of, or has been subject of a demand by the United States of America or any of its officers, agents, or employees, from any source or by any agency whatsoever, shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively made suitable provision for the satisfaction of all claims against said Governments respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered through the acts of the Imperial German Government, or its agents, or the Imperial and Royal Austro-Hungarian Government, or its agents, since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise, and also shall have granted to persons owing permanent allegiance to the United States of America most favored-nation treatment, whether the same be national or otherwise, in all matters affecting residence, business, profession, trade, navigation, commerce, and industrial property rights, and until the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively confirmed to the United States of America all fines, forfeitures, penalties, and seizures imposed or made by the United States of America during the war, whether in respect to the property of the Imperial German Government or German nationals or the Imperial and Royal Austro-Hungarian Government or Austro-Hungarian nationals, and shall have waived any and all pecuniary claims against the United States of America."

option of the victorious powers. Later, the Supreme Court in the case of Cummings v. Deutsche Bank, 300 U. S. 115 (1936), held that by reason of the first World War and the joint resolutions of Congress of 1921, supra, and the Treaty of Berlin ratifying the resolutions and the seizure of enemy property, the United States had become the absolute owner of the seized property of Germany and of German nationals.[4]

On July 28, 1941, the California legislature enacted a statute providing that the right of an alien nonresident to succeed to the property of a deceased person depended upon a reciprocal right in United States citizens.[5] At that time the German-American Treaty of 1925, Article IV, supra, was in effect, and similar treaties with all the principal powers were also in effect. This language of treaty concerning reciprocal rights was practically universal with only slight difference of phraseology.

60 Prior to our active participation in the Second World War, Congress and the President under the emergency provision of the Trading with the Enemy Act, had taken action. On May 7, 1940 (54 Stat. 179), Congress by joint resolution gave the President extensive powers "during time of war, or during any

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[4] "By exertion of the war power, and untrammeled by the due process of just compensation clause, Congress enacted laws directing seizures, use and disposition of property in this country belonging to subjects of the enemy. Alien enemy owners were divested of every right in respect of money and property seized and held by the Custodian under the Trading with the Enemy Act. *United States* v. *Chemical Foundation*, 272 U. S. 1, 9–11. *Woodson* v. *Deutsche, etc. Vormals*, 292 U. S. 449, 454. The title acquired by the United States was absolute and unaffected by definition of duties and limitations upon the power of the Custodian or the Treasurer of the United States. Congress reserved to itself freedom at any time to dispose of the property as deemed expedient and right under circumstances that might arise during and after the war." Quoted from *Cummings* v. *Deutsche Bank*, 300 U. S. 115, 120.

[5] "Chapter 3. Inheritance Rights of Aliens.

259. The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from estates of persons dying within such foreign countries.

259.1. The burden shall be upon such nonresident aliens to establish the fact of existence of reciprocal rights set forth in Section 259.

259.2. If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property.

SEC. 2. This act is hereby declared to be an urgency measure necessary for the immediate preservation of the public peace, health and safety within the meaning of Section 1 of Article IV of the Constitution of the State of California, and shall take effect immediately. The following is a statement of the facts constituting such necessity:

A great number of foreign nations are either at war, preparing for war or under the control and domination of conquering nations with the result that money and property left to citizens of California is impounded in such foreign countries or taken by confiscatory taxes for war use. Likewise money and property left to friends and relatives in such foreign countries by persons dying in California is often never received by such nonresident aliens but is seized by these foreign governments and used for war purposes. Because the foreign governments guilty of these practices constitute a direct threat to the Government of the United States, it is immediately necessary that the property and money of citizens dying in this country should remain in this country and not be sent to such foreign countries to be used for the purposes of waging a war that eventually may be directed against the Government of the United States.

other period of national emergency" concerning transfer of property (amending subdivision (b) of Section 5 of the Act of October 6, 1917).

On April 10, 1940, the President had issued Executive Order 8389, which was ratified and confirmed by a joint resolution of May 7, 1940 (Section 2, Joint Resolution, 54 Stat. 179. On June 14, 1941, Executive Order 8389, supra, was modified. Further modifications were made after the United States entered the war December 8, 1941. (Executive Order December 9, 1941; Executive Order 8998 of December 26, 1941; The "First War Powers Act", an amendment of the Trading with the Enemy Act, 55 Stat. 838, 839. §§ 301, 302, 303, was enacted December 18, 1941;
61 Executive Order 9095 of March 11, 1942 providing for the office of Alien Property Custodian and fixing his powers and duties.)

This Executive Order 9095 provided in Section 3 as follows:

"3. Any property, or interest therein, of any foreign country or a national thereof shall vest in the Alien Property Custodian whenever the Alien Property Custodian shall so direct * * *"

On January 23, 1943, the Alien Property Custodian issued his so-called Vesting Order No. 762, purporting to vest in said Alien Property Custodian "all the right, title, interest and claim of the four German nationals in and to the estate of Alvina Wagner, deceased, and all the right, title and interest and estate of these German nationals in and to the decedent's real property in San Francisco."

The vesting order was filed with the Division of the Federal Register on January 27, 1943 and was published January 28, 1943 in 8 Fed. Reg. 1252. On April 6, 1943 the Alien Property Custodian filed his complaint in this action, in which he claimed to be the owner of all the estate of Alvina Wagner, deceased, by virtue of said vesting order, and demanding that the Superior Court in and for the City and County of San Francisco, California, sitting in probate to administer the estate of Alvina Wagner, deceased, distribute said property to him as owner thereof, as and when ready for distribution upon the settlement of the final account. This action in effect an action to quiet title of the Alien Property Custodian, was within the jurisdiction of the District Court (Markham v. Allen, — U. S. —, Jan. 7, 1946, supra). The District Court rendered judgment to that effect and the American heirs of Alvina Wagner appeal.

The appellants contend that the California Probate Code Sections 259, 259.1, and 259.2, quoted in full in footnote 5, supra, limit the right of nonresident aliens to take by will or by succession to those cases where reciprocal rights are extended to the

United States citizens by the country of their residence and that such limitation is within the legislative power of the State, and is valid. We will first address ourselves to this question.

62 Constitutionality of Sections 259, 259.1 and 259.2, Cal. Code, supra

The appellee claims that the provisions of the Probate Code of California, §§ 259, 259.1 and 259.2, dealing with reciprocal rights of nonresident aliens to land and personal property by inheritance or succession are void and unconstitutional because the California statutes apply in the domain of foreign affairs which is the exclusive prerogative of the Federal Government, and fully occupied by it.

The federal power invoked by the appellee is predicated upon the provisions of the Constitution vesting the treaty making power and war power, including the right of capture, in the Federal Government (Constitution, Article I, § 8, Clause 11), and the provisions of the Constitution which prohibit states from entering into treaties with other powers. (Constitution, United States, Article I, § 10.) It is claimed by the appellee that the power of the Federal Government to deal effectively with the rights of enemy aliens is interfered with and frustrated by the statute of California above cited. However, it is clear that the state has power to regulate the right of inheritance and succession and testamentary disposition of property within the state, Irving Trust Company v. Day, 314 U. S. 556, 562. The appellants claim that the power of the state government to make the right of nonresident aliens to succeed to property of the deceased depend on a reciprocal right on behalf of American citizens is a clear exercise of the right of the state to determine questions of inheritance, testamentary disposition and succession.

Assuming for the time, although this point is disputed,* that the Treaty of 1925, Article IV grants the reciprocal rights required by the provision of the California Probate Code under consideration, the requirement of reciprocity by the statute is only of importance if Article IV of the treaty is abrogated or suspended so that there is no longer any treaty provision to meet the condition of the California Probate Code requiring such reciproc-
63 ity. In that case the California statute, if valid, would deny rights of inheritance to the German nonresident

* The California statute requires that the proceeds derived from the sale of land provided for in Article IV of the Treaty and the personal property shall be received in the United States (see California Probate Code, § 1026, also 1060-1066).
There is also a question raised as to whether the nonresident alien can take personal property located within the United States.

aliens: It is to meet this situation that the appellee claims that the state statute is void because it violates the Constitution of the United States.

The appellee argues that the War Powers granted to the United States by the Constitution include by express provision (U. S. Constitution, Article I, Clause 10) the right to capture enemy property and that a state law which prevents or interferes with such capture is an interference with the power and is consequently void. The difficulty with this contention in the case at bar is the claim that the enemy alien has no right to the property. If the California statute is valid, it is not enemy property. The argument that the state should treat alien enemies more generously in order that the United States might seize their property and use it for its own purposes seems hardly valid as applied to constitutional power. The California statute does not apply to enemies only, but applies as well to any nonresident aliens, friends and allies as well as foes. Recent decision of the Supreme Court, Korematsu v. United States, 323 U. S. 214, 217; Hirabayashi v. United States, 320 U. S. 81, 89, concerning the war powers of the Federal Government show that the war power affects almost every field of private right on the basis of necessity. If this great reservoir of Federal power is ipso facto a denial of any power to the States in that reservoir, whether or not a war is being waged or such powers are being exercised, then the power of states is thrown into the utmost uncertainty and confusion.

It should be said in addition that the appellee relies upon a so-called emergency clause of the California Probate Code (California Statutes, 1941, Chapter 895, quoted in footnote 5) to show that the purpose of the California legislature was to prevent the export of money to foreign powers, which were seizing and diverting if not appropriating the property of citizens of California. It is said that this makes the California statute one of retribution and confiscation and thus within the domain of federal power over foreign affairs. The statute does not purport to be retributive and the addition of the emergency clause does not make it so. This emergency clause is required by the state constitution where a law is to take effect immediately rather than in 90 days, as would otherwise be the case. The motive of the legisture is not subject to judicial scrutiny, so long as the legislature acts within its
64 constitutional authority. (Amy v. Watertown, 130 U. S. 301, 319.) We conclude that the California statute is constitutional and valid.

Assuming as we have decided, that the statute of California in making the right of the nonresident German legatees and devisees depend upon a reciprocal right, we have need to consider whether

or not the Treaty of 1925 with Germany providing for reciprocity meets the requirements of the California statute. Before considering the exact language of the treaty, the effect of which is a subject of disagreement between the parties, we will consider the claim of the appellants that the treaty (Art. IV supra) in question was either abrogated or suspended during World War II.

War Abrogating Treaty

The question whether the outbreak of war abrogates wholly a treaty of peace, designed avowedly for a state of peace, is passed over as unnecessary and improper for discussion. Eminent authorities on international law agree that the stipulations of a treaty of peace are not all necessarily avoided or made inoperative by war. Those stipulations which are incompatible with existence of war, and those which war makes it impossible to carry into execution are avoided or become inoperative; others of such intrinsic nature as to be applicable and feasible in war may continue.[*] Accordingly, under those authorities it is sufficient to determine whether Article IV of that Treaty became inoperative on and after December 8, 1941, and thereby struck away the possibility that reciprocal rights of inheritance and testamentary succession existed between Germany and the United States and their resident nationals. The trial court in its opinion alludes to this ques-
65 tion but does not decide it nor base judgment upon any conclusion as to it, nevertheless it is implicit in any decision of the case.

By express terms of Article IV of the Treaty "Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other." With respect to "real and other immovable property" or "interests within" one country devolving by the death of a national of the other, a national of one "were he not disqualified by the laws of the country where such property or interests therein is or are situated," "shall be allowed a term of three years in which to sell the same * * * without restraint or interference" and except from any duties or charges other than those which may be imposed on nationals of the country where the property "from which such proceeds may be drawn. Contrasted with this,

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[*] V. Hackworth, International Law Digest, § 505, citing Karnuth v. Albro, 279 U. S. 231, 236; 5 Moore, International Law Digest, § 779, p. 383, quoting 1 Columbia Law Review, No. 4, pp. 209–223; 2 Oppenheim, International Law, § 99; Hall, International Law (8 Ed.) pp. 405, 453, 454, 457; and see Techt v. Hughes, 229 N. Y. 222, 128 N. E. 185, 11 A. L. R. 166 with Note p. 180.

See also the following cases on the effect of war to render treaty stipulations inoperative: The Rapid, 20 Fed. Cases, pp. 297, 300, No. 11576; 1 Gall. 295; affirmed 8 Cranch 155; Jecker, Torrey & Co. v. Montgomery, 18 Howard (59 U. S.) 110, 112; United States v. Grossmayer, 9 Wall. (76 U. S.) 72, 75; Ross v. Jones, 22 Wall. (89 U. S.) 576, 586; Mayer v. Garvan, 278 Fed. 27, 32; Second Russian Ins. Co. v. Miller, 297 Fed. 404, 410; affirmed 268 U. S. 552.

from and after December 8, 1941 (before Alvina Wagner made her will) it has been unlawful for a German national to enter the United States, to have any communication of a business nature therewith, to remove property or money therefrom, and reciprocally unlawful for a national of the United States to have dealings or communications with one of Germany. No money or property could be taken out of this country to Germany or for its nationals. (See Trading With the Enemy Act §§ 7 (c, d) and 5, as amended by 55 Stat. 839.) In fact, even before there was war (December 8, 1941) Executive Order No. 8389 forbade monetary transmissals such as would have been necessary in case of a national of Germany selling real property pursuant to Article IV of the Treaty of 1925 and seeking to withdraw the money from the United States. [Many other countries than Germany were included in this order, which was made when the United States was not a belligerent.] But the Trading With the Enemy Act was broader and more severe, making it unlawful for the German legatees to be brought into the United States or to transmit communications to them (Trading With the Enemy Act § 3), or to have any form of business or commercial communications or intercourse with them (Trading With the Enemy Act §§ 2 and 3). They therefore could not come into the United States and as residents become eligible for naturalization or by treaty qualify (see California Alien Land Law §§ 1 and 2; Stat. 1921, p. lxxxiii, as amended 1923, 1927) to take land; they are incapable of taking by will because they are incapable of taking property by
66 law (See California Probate Code § 27); and they are incapable of "appearing and demanding" the property if it were distributed to them, either as legatees or as heirs, in consequence of which it must be distributed to the State of California for escheat, if there are no other qualified heirs (California Probate Code §§ 1026, 1027).*

These conditions are irreconcilable with Article IV of the Treaty of 1925, which under the rules above stated must therefore be regarded as inoperative since December 8, 1941.

However, basically the question of whether or not Article IV of the treaty remains in effect during the war depends upon the intent of the high contracting parties as expressed in the treaty, or as implied therefrom by the customary interpretation of such

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*Calif. Prob. Code, § 1026 reads: "A nonresident alien who becomes entitled to property by succession must appear and demand the property within five years from the time of succession; otherwise, his rights are barred and the property shall be disposed of as escheated property."

Calif. Prob. Code, § 1027 in part reads: "If the court, at the time set for hearing of the final account, or such time thereafter to which the matter may be continued, does not distribute the entire balance of the estate remaining for distribution to known heirs, devisees, or legatees entitled to succeed thereto, it must distribute to the State of California that portion of such estate not distributed to known heirs, devisees or legatees."

agreements by nations generally. It is important therefore to consider the relation of the United States and Germany at the time the Treaty of 1925 was negotiated, and when ratified and confirmed in 1925, as indicating their intent. (As to previous treaties see discussion in footnote 8, supra.) This treaty was the result of the first World War, which had terminated so far as other powers were concerned by the Treaty of Versailles which the United States refused to join in. Congress in 1921 had passed a joint resolution approved July 2, 1921 (40 Stat. 106, supra), in effect appropriating or confiscating all property of Germany or German nationals "which was, on April, 1917, in or has since that date come into the possession or under the control of, or has been subject of a demand by the United States of America or any of its officers, agents, or employees, from any source or by any agency whatever * * *." (See footnote No. 3.)

It provided that such property "shall be retained by the United States of America and no disposition thereof made, except
67 as shall have been heretofore *or specifically hereafter shall* be provided by law until such time as the Imperial German Government * * * or their successor or successors shall have respectively made suitable provisions for the satisfaction of all claims against said Governments respectively of all persons wheresoever domiciled who owe permanent allegiance to the United States of America, and who have suffered loss through the acts of the Imperial German Government * * *." Germany in the Treaty of Berlin of 1921 agreed with the United States to this treatment of Germany and German nationals and expressly ratified the same. The Supreme Court later (1936) in Cummings v. Deutsche Bank, 300 U. S. 115, supra, held the effect of this resolution and treaty of 1921 was to vest absolute title to such property in the United States. The Prussian treaty in effect at the time the United States declared war against Germany in World War I (April 6, 1917) concerning reciprocal rights of inheritance of citizens (Treaty with Prussia of May 1, 1828, Article XIV, 8 Stat. 378), was substantially the same as in the treaty with Germany or its successor negotiated in 1923, effective in 1925. As to the German Treaty in effect at the time the United States declared war against Germany in 1917, we have seizure of property authorized by the Trading With the Enemy Act, and its confiscation by the United States, and agreement thereto by Germany. Moreover, although not of controlling importance, we have a new treaty negotiated and entered into containing in Article IV, supra, the reciprocal rights provision which would have been unnecessary if such provisions were still in effect under the older treaty. The conduct of the two nations entering into the treaty of 1925 immediately prior thereto is not consistent with the idea that the high

contracting parties believed that the similar provision of the earlier treaty survived the impact of war, or that Article IV of the later treaty would survive another World War. There is not a single word that indicates that the parties believed that property inherited under the laws of the nation, was any more sacred, or any less likely to confiscation than any other alien owned property within the jurisdiction of the United States. In the teeth of this situation general statements of text writers, or of courts or judges, based upon the modern tendency to give greater consideration to private rights during war cannot have much weight. It was agreed in the Treaty of 1921 that with reference to treaty
68 rights under War I treaties, such private rights should give way to the needs or to the results of war.

In addition to the conclusions based upon the effect of World War I, upon the Prussian Treaty of 1828, we have the authorization in War Powers Act of 1941 (an amendment to the Trading With the Enemy Act, 55 Stat. 838, 837), to the President, "With respect to any property subject to the jurisdiction of the United States; and any property or interest of any foreign country or nationals thereof shall vest, when, as, and upon the terms directed by the President, in such agency or persons as may be directed by the President, in such agency or persons as may be designated from time to time by the President, and upon such terms as the President may prescribe such * * * property * * * shall be * * * dealt with * * * for the benefit of the United States." (Section 301, subsection (B)). The Act contains no hint or suggestion that property to be inherited after December 8, 1941 should not be subjected to confiscation although that which had been theretofore inherited, would be so subject. Thus Congress by ignoring the Treaty effectively provided for breaking or suspending or abrogating the reciprocal inheritance provision of the Treaty. To award the decedent's property to the Alien Property Custodian would be to give him a right in direct contradiction to the right of aliens under the Treaty which he contends is in full effect.

Amendment to California Law—Burden of Proof

The California statute under consideration (Sections 259, 259.1 and 259.2) provided in § 259.1 that the burden of proving the existence of reciprocal rights dealt with in Section 259 was upon the "nonresident alien." This section was amended in 1945 (Chapter 1160, California Laws, § 259, 1945) to provide that "It shall be presumed that such reciprocal rights exist and the presumption shall be conclusive unless prior to the hearing or any petition for distribution of all or a portion of such property to an

alien heir, devisee or legatee not residing in the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not, or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the non-
69 existence of such reciprocal right or rights shall be upon the petitioner. * * *"

The amendment was enacted after the decision of this court upon the appeal but before the decision of the Supreme Court on January 7, 1946. It is claimed by the appellee in the brief filed herein after the case was remanded to this court, that the amendment is applicable to the present appeal and requires affirmance.

The appellee's claim seems to be that the new law (California Probate Code, § 259, California Statutes 1945) holds the title in suspense until the nonresident alien acts and that during this interval the property tentatively rests in the German devisees and legatees and consequently is subject to seizure as their property before the procedure outlined by the California statute, to ascertain the rights of heirs, legatees and devisees.

It may take much time to determine who the heirs are, witness the Blythe case cited in the briefs, (Estate of Blythe, 110 Cal. 226; Blythe v. Hinckley, 180 U. S. 333), wherein the matter was in litigation for over 15 years. Nevertheless, when the will is proved, or the heirs ascertained, this title relates back to the death of the owner—there is no hiatus. Western Pacific Railroad Co. v. Godfrey, 166 Cal. 346, 349, and cases cited.

The Federal Court takes judicial notice of all treaties, and so does the state court. They do not have to be proved, consequently if the treaty grants reciprocal rights, there is no need of further proof. Whether it has been repealed or abrogated is also a subject of judicial notice.

It is conceivable that the foreign nation might without a treaty, and by its own statute grant rights which were in fact fully reciprocal, if this were done by statute, it would have to be proved, and what must be proved to sustain a complaint must be alleged. There is no such allegation here.

Reversed and remanded.

[File endorsement omitted.]

70 In United States Circuit Court of Appeals for the Ninth Circuit

No. 10760

ALVINA ALLEN ET AL., APPELLANTS

vs.

JAMES E. MARKHAM, AS HE IS ALIEN PROPERTY CUSTODIAN, APPELLEE

Decree

Filed and entered May 22, 1946

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court.

[File endorsement omitted.]

71 In United States Circuit Court of Appeals for the Ninth Circuit

[Title omitted.]

Order denying petition for amendment of opinion

July 17, 1946

Upon consideration thereof, and by direction of the Court, it is ordered that the petition of appellee, filed June 19, 1946, for amendment of the opinion of this Court, heretofore filed on May 22, 1946, be, and hereby is denied.

72 In United States Circuit Court of Appeals for the Ninth Circuit

[File omitted.]

Order staying issuance of mandate

Filed July 19, 1946

Upon application of Frank J. Hennessy, counsel for the appellee, and good cause therefor appearing, it is ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed to and including August 22, 1946; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

FRANCIS A. GARRECHT,
United States Circuit Judge.

Dated San Francisco, California, July 19, 1946.

[File endorsement omitted.]

73 [Clerk's certificate to foregoing transcript omitted in printing.]

74 Supreme Court of the United States

No. 626, October Term, 1946

Order allowing certiorari

Filed December 9, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 51,490. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 626. Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, Petitioner vs. Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, et al. Petition for a writ of certiorari and exhibit thereto. Filed October 18, 1946. Term No. 626, O. T. 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1947